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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ENRIQUE VILLEGAS, Defendant and Appellant.	B215575 (Los Angeles County Super. Ct. No. KA085367)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed in part, modified in part and remanded.

David Arredondo for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Ricardo Villegas guilty of three counts of assault with a semiautomatic firearm and found true the special allegation as to each count that defendant personally used a firearm. The trial court entered judgment against defendant and sentenced him to 10 years in prison. Defendant appealed, arguing the trial court made various errors during trial.

We agree with defendant that the trial court erred in finding one witness was unavailable for trial and, as a result, permitting the prosecution to use that witness's preliminary hearing testimony. We reject defendant's remaining arguments on appeal. We modify the judgment accordingly and remand to the trial court for resentencing.

Background

Until he was fired in March 2008, defendant had worked at Sunburst Rock, in the city of Irwindale, for about one year. The general manager of Sunburst Rock fired defendant following a dispute between defendant and his co-worker, Alvaro Diaz.

Eight months after defendant had been fired, on the evening of November 10, 2008, Diaz called the general manager, stating defendant had just assaulted him and other employees who had been inside a trailer at Sunburst Rock. After the call, the general manager went to Sunburst Rock, where he found Diaz, who was bleeding from one ear, and other employees outside the trailer. Diaz told the general manager that defendant had come into the trailer with a mask over his face, demanded money and hit Diaz on the ear.

The other employees who had been inside the trailer with Diaz that night were Jose Gonzalo Santis Cruz, Raul Alvarez, and his brother Humberto Alvarez.[1] Raul, Humberto and Diaz each testified and gave similar accounts of what happened that evening.[2] The four co-workers were watching television in the trailer at Sunburst Rock,

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[1] Because they share the same last name, we refer to the Alvarez brothers as Raul and Humberto.

[2] At trial, the court allowed the prosecution to use Diaz's preliminary hearing testimony. The court held that Diaz was unavailable and that the prosecution had used due diligence in trying to locate him. We discuss this in detail below.

when two masked men holding guns came into the trailer. One man stayed by the door, while the other moved further inside the trailer. Humberto and Diaz both stated that the masked men pointed their guns at the four of them watching television. According to Raul, the man who came further inside the trailer said "Get on the ground, assholes." Diaz heard him say "I'm going to fuck you up." Humberto similarly stated the men ordered them to "get on the ground."

The man who came further inside the trailer hit Cruz and then Diaz with the butt of his gun, causing Diaz's ear to bleed. As Diaz tried to defend himself, he lifted the man's mask, revealing his face. Raul, Humberto and Diaz each saw that it was defendant, whom they all knew. A few days after the incident, Raul identified defendant in a photographic lineup.

After his mask was lifted, defendant and the other man fled to a car waiting outside. Raul and Diaz chased after them, but took cover when defendant turned as he was running and fired a shot in their direction. Humberto heard the shot and saw a spark come from defendant's gun. Humberto described the shot as a random shot in the direction of the trailer and the four men. Diaz was not sure who fired the shot.

Neither Raul, Humberto nor Diaz is familiar with guns. Raul and Humberto do not know the difference between a semiautomatic weapon and a revolver. Humberto said defendant's gun was "like a pistol." At the preliminary hearing, Raul described defendant's gun as a revolver. At trial, he explained that he used the word "revolver" because he had heard of revolvers and thought the gun "was almost like a revolver." But, he was using the term loosely. He also said the gun defendant was holding was "squared." Although not familiar with guns, Diaz knows there are semiautomatics, which are square in shape, and revolvers, which are rounded. He testified defendant was holding a black, "almost square" gun. Diaz assumed it was a semiautomatic gun. He could not see the what type of gun the man by the door was holding.

An Irwindale Police Officer who responded to the scene stated that, when he spoke with the victims that night, none of them mentioned defendant had fired a shot. As a result, the officer did not search the grounds that night for evidence. An Irwindale

Police Detective spoke with the victims a few days later. They told him defendant had fired a shot toward them as he was fleeing the trailer. The detective searched the area, but did not find any cartridges or expelled bullet casings. And, in a search of defendant's home about one month later, no ammunition or firearms were located. The detective also explained some differences between semiautomatic handguns and revolvers, noting square-shaped guns are more consistent with semiautomatic guns, while revolvers have a cylinder shape. He showed his semiautomatic handgun to the jury and explained how it worked.

Defendant testified on his own behalf. He denied any involvement in the incident at Sunburst Rock and denied having any hard feelings toward Diaz. He claimed the victims were lying when they said he beat them with a gun. In November 2008, he lived with Maria Luz Ortega, whom he was dating. In particular, on November 10, 2008, he was taking care of Ms. Ortega at home because she was ill. He also remembered being home that day because he helped Ms. Ortega's daughter move to a new apartment that evening. He knew where the trailer was at Sunburst Rock and knew that some workers, including Diaz, stayed there overnight.

Ms. Ortega also testified on defendant's behalf. She remembered defendant was home with her on either November 8, 9, or 10, 2008 because she was sick and because her daughter was moving. Defendant was helping them both.

The jury found defendant guilty on all three counts of assault with a semiautomatic firearm in violation of Penal Code, section 245, subdivision (b), and found true the special allegation as to each count that defendant personally used a firearm within the meaning of Penal Code, section 12022.5, subdivision (a). On count one, the court sentenced defendant to the mid-term of six years in prison, plus four years for the weapons allegation. The court imposed the same terms for counts two and three, ordering each to run concurrent with the sentence on count one.

Discussion

1. Witness Unavailability and Use of Preliminary Hearing Testimony

Defendant argues the trial court erred in finding Diaz unavailable and in allowing the prosecution to read Diaz's preliminary hearing testimony to the jury. We agree. We conclude the error was harmless as to the identification of defendant as the perpetrator of the alleged crimes, but conclude the error was prejudicial as to the type of gun used.

a. Unavailability of Diaz

Although the federal and state Constitutions guarantee a criminal defendant the right to confront witnesses against him or her, that right is not absolute. (*People v. Bunyard* (2009) 45 Cal.4th 836, 848-849.) Testimony given in a preliminary hearing against the same defendant may be used at trial if the witness is unavailable at trial. (Evid. Code, § 1291 ("section 1291").) A witness is unavailable if he or she is absent from the hearing and beyond the reach of the court's process. (Evid. Code, § 240, subd. (a)(4) ("section 240").)

Here, the prosecution argued, and the trial court agreed, that Diaz was unavailable to testify at trial. On Thursday, March 12, 2009, the first day of trial, and when the jury was sworn, the prosecutor informed the court that, between three and four weeks earlier, he had learned Diaz returned to Mexico because his visa had expired. The prosecutor indicated "the usual searches" had been unsuccessful in locating Diaz.

On February 26, 2009, the prosecutor asked a District Attorney investigator to locate Diaz. The investigator contacted Diaz's brother, who said he had not spoken with Diaz since he had left for Mexico five weeks before. The investigator also spoke with the office manager at Sunburst Rock, who had no address for Diaz in Mexico. In addition, the investigator checked law enforcement databases, but they contained no Mexico address for Diaz. Two days before the start of trial, the investigator called Diaz's brother again, but his phone was not accepting calls. He tried the office manager again the next day, but she still had no address for Diaz. She mentioned, however, she might be able to get his address and, if successful, she would forward it to the investigator.

At about 4:00 in the afternoon of the first day of trial, March 12, 2009, the investigator called Diaz's brother again, this time the brother picked up and had an address and phone number for Diaz in Mexico. The investigator contacted Diaz at that phone number. Diaz was willing to testify, but he had no paperwork to re-enter the United States. The prosecution could have applied, but did not apply, with the Immigration Customs Service to bring Diaz back to the United States. That process would have taken at least two to four weeks. On March 13, 2009, the second day of trial and after the jury had been sworn, the prosecutor informed the court that Diaz had been located late the day before, but it would take weeks to return him to the United States. On these facts, the trial court found Diaz unavailable for trial.

Because Diaz is a Mexican national in Mexico, he was outside the court's process and, therefore, was unavailable for purposes of section 240, subdivision (a)(4). (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1432-1434.)

Nonetheless, we conclude Diaz was not "unavailable" in the constitutional sense.[3] "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial. [Citation.] The United States Supreme Court has described the good-faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness. . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.' [Citation.]" (*People v. Herrera*, *supra*, 49

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3 We asked the parties to brief (1) whether, given the fact that Diaz could have been brought to the United States within a minimum of two to four weeks, he was unavailable in the constitutional sense, and (2) how, if at all, the principles enunciated in *People v. Herrera* (2010) 49 Cal.4th 613 affect this case.

Cal.4th at p. 622.) When options exist for the return of a foreign witness to the United States, "the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met." (*Id.* at p. 628.) Thus, unavailability in the constitutional sense "requires a determination that the prosecution satisfied its obligation of good faith in attempting to obtain [Diaz's] presence." (*Id.* at p. 623.)

Here, it is undisputed Diaz was willing to testify and there was a procedure in place for obtaining his presence at trial—namely, applying to the Immigration Customs Service. Although Diaz was located after the jury was sworn and the procedure to return him to the United States would take at least two to four weeks, while the trial was estimated to take only three days, in order to show good faith efforts to have Diaz returned to the United States, the prosecution should have applied to the Immigration Customs Service. The prosecution could have moved for a continuance of trial in order to obtain more time to bring Diaz back to the United States. Because the prosecution did not take these available steps, it failed to demonstrate a "good faith effort" to obtain Diaz's presence at trial.

b. Use of Diaz's preliminary hearing testimony

Because Diaz was not "unavailable" in the constitutional sense, the trial court erred in allowing the prosecution to use Diaz's preliminary hearing testimony at trial. (See § 1291.) Nonetheless, in all but one respect, we conclude the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Besides Diaz, witnesses Raul and Humberto both identified defendant, whom they both knew. They saw defendant's face and witnessed him enter the trailer with a gun, order them to the ground, use the gun to hit Diaz, and fire a shot while fleeing. Additionally, the jury heard defendant was fired because of a work-related dispute with Diaz and defendant testified he was fired because his boss thought he "destroyed that guy's car." Finally, defendant's alibi was weak, as his girlfriend could only say he was with her on one of a range of three days. Consequently, the error was harmless as to the issue of the identity of the perpetrator.

As to the type of gun defendant used, however, we conclude the error was prejudicial. At the preliminary hearing, Diaz testified that he assumed the gun was a semi-automatic and that it was "almost square." The other two witnesses—Raul and Humberto—were not as clear on what type of gun defendant used and did not know the difference between a semi-automatic weapon and a revolver. Humberto said it was "like a pistol" and Raul described it as a revolver (although he was using that term loosely) and "squared." Accordingly, in the absence of Diaz's preliminary hearing testimony, substantial evidence does not support the jury's finding that defendant used a semi-automatic weapon.

When the evidence is insufficient to establish the commission of the crime of which defendant was convicted, we may modify the judgment to reflect a conviction of a lesser, necessarily included offense. (Pen. Code, § 1181, subd. (6); *People v. Jackson* (2000) 77 Cal.App.4th 574, 580, fn. 3.) Here, the lesser, necessarily included offense at Penal Code section 245(b), assault with a semi-automatic, is assault with a firearm in violation of Penal Code section 245, subdivision (a)(2).

2. Motion for Judgment of Acquittal on Count Two

At the close of the prosecution's case, defense counsel moved unsuccessfully for a judgment of acquittal under Penal Code, section 1118.1 as to count two, which involved victim Raul Alvarez. Counsel argued that, because defendant did not hit Raul with the gun, but only pointed it at him, the evidence was insufficient to sustain a conviction of assault on count two. On appeal, defendant argues the trial court erred in denying that motion. We disagree.

"On a motion for judgment of acquittal under section 1118.1, the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence. The court must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. [Citation.] We independently review the trial court's ruling." (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.)

Assault is a general intent crime. To be guilty of an assault, a defendant need not have the specific intent to cause injury to a particular person. (*People v. Williams* (2001) 26 Cal.4th 779, 782, 788; *In re Tameka C.* (2000) 22 Cal.4th 190, 198.) Defendant is simply incorrect when he argues the opposite. Assault "only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams*, *supra*, 26 Cal.4th at p. 790.)

Thus, although defendant did not use his gun to hit or injure the victim in count two, the evidence was sufficient to sustain the conviction on count two for assault with a semiautomatic firearm. Specifically, there was evidence indicating defendant pointed the gun at the victim and ordered him to get on the ground. "To point a loaded gun in a threatening manner at another . . . constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269, citing *People v. Williams*, *supra*, 26 Cal.4th at p. 782.) Additionally, the evidence showed defendant fired the gun in the direction of all three victims, which can also constitute an assault on each victim. (*People v. Trujillo* (2010) 181 Cal.App.4th 1344.)

3. Evidence of Defendant's Earlier Conflict with Diaz

Without citation to legal authority, defendant argues the trial court erred in admitting evidence that defendant was fired because of his work-related conflict with Diaz. We are not persuaded.

At the start of trial, the trial court held a section 402 hearing to determine whether to permit the general manager at Sunburst Rock to testify about a phone call he received from Diaz in March 2008 (i.e., eight months before the incident at issue). The prosecution sought the admission of the manager's testimony because, according to the prosecution, it was relevant to identity and motive. At the hearing, the general manager stated that, in March 2008, he received a phone call from Diaz, who sounded "shooken up." Diaz told the manager that defendant had vandalized Diaz's car and asked the

manager to come look at the car. When the manager returned to the work site, he saw that Diaz's car had a cinder block through the front window and a rock through the back window. As a result of that incident, the manager fired defendant.

Defendant argued the substance of what occurred (i.e., the vandalism to Diaz's car) should be excluded under Evidence Code, section 352 ("section 352"). The trial court ruled the manager could testify that he fired defendant because of a work-related conflict with Diaz. The court refused to admit, however, the details of that conflict (namely, that defendant had vandalized Diaz's car). Defendant now asserts this ruling improperly permitted the jury to speculate about what the conflict might have been.

Initially, because defendant cites no legal authority to support his argument, the argument is waived and we need not consider it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Additionally, defendant waived the argument because he did not object below to the admission of testimony regarding the fact defendant was fired because of a work-related conflict with Diaz. (Evid. Code, § 353; *People v. Doolin* (2009) 45 Cal.4th 390, 438.) At trial, defendant objected only to admitting the substance of why defendant was fired (i.e., the vandalism). Indeed, he characterized the trial court's ruling on the issue as "somewhat reasonable."

Even addressing the argument, however, we disagree with defendant. We review for abuse of discretion the trial court's rulings on relevance and admission or exclusion of evidence under section 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) Here, the trial court struck a reasonable balance between admitting motive and identity evidence (defendant lost his job as a result of a conflict with Diaz) and refusing to admit the details of the conflict with Diaz (defendant vandalized Diaz's car). Moreover, even if this were error, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Alcala* (1992) 4 Cal.4th 742, 791 [applying *Watson* standard to section 352 evidentiary ruling].) Regardless of motive, Diaz, Raul and Humberto each identified defendant as the perpetrator.

4. Remaining arguments

In light of our conclusions above, defendant's remaining arguments are moot and we do not address them.

Disposition

The judgment is modified to reflect defendant's convictions on counts one, two and three of the lesser, necessarily included offence of assault with a firearm in violation of Penal Code, section 245, subdivision (a)(2). The judgment is affirmed in all other respects. The case is remanded for resentencing in accordance with this opinion.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.